

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Definition of Markets for Purposes of the)
Cable Television Mandatory Television)
Broadcast Signal Carriage Rules)

CS Docket No. 95-178

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF THE POST COMPANY

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SUMMARY

In response to the Commission's Further Notice of Proposed Rulemaking, The Post Company (hereinafter "Post") submits the following comments for consideration. First, as the Commission suggested, there is reason to be concerned that the transition to Nielsen DMAs for must-carry purposes will negatively affect smaller stations. The effect of using updated DMAs is such that cable systems which were included within a station's television market for one cycle may not be in its market in the next cycle. If a station had previously modified its signal to ensure reception at the cable system's headend, the station will stand to lose its investment in specialized signal-delivery equipment. Post urges the Commission to modify Section 76.55(e) of the Commission's rules so stations faced with this predicament may continue to demand must-carry on those systems for which they installed equipment to ensure delivery of a good quality signal.

In addition, Post is very concerned that Nielsen's market determinations do not merely reflect audience viewing patterns. As Post has discovered, the methodology used by Nielsen in establishing its DMAs is not readily available; therefore, without knowledge of the methodology, it is not possible to ascertain the exact effect Nielsen's policies will have on market determinations.

But, from the information provided, Post concludes that Nielsen's policies are not consonant with the Commission's conclusion that use of updated DMAs best serves the stations' intended markets and cable subscribers' needs. Moreover, the petitioning process permitted by Nielsen to modify market determinations will harm smaller stations which are not able to take advantage of this process in order to manipulate their DMA assignments. Finally, Nielsen's petitioning process conflicts with the Commission's market modification process. By petitioning Nielsen directly, stations can avoid the Commission's market modification process altogether, or they can petition Nielsen after receiving an adverse decision from the Commission (or vice-versa).

Additionally, the Commission should not alter prior market modification decisions made pursuant to Section 614(h). The market modification process is not dependent on the methodology used to make market determinations in general. Therefore, the transition to Nielsen's DMAs is of no consequence, and prior decisions, and those made following the 1996 elections, should be left intact.

Furthermore, the Commission's proposed additional criteria would expedite the market modification process. The legislative history reveals that in promulgating the original criteria, Congress did not intend to limit the factors to be given consideration; therefore, the Commission's consideration of these additional factors is permissible. More importantly, the addition of the proposed factors will give parties notice of what the Commission considers to be important in making market modification determinations. Thus, parties will know in advance to collect such information, thereby facilitating the process.

Finally, the Commission's proposal to establish a prima facie standard will add nothing to the market modification process. First, the party seeking modification will not always be the one to have the information most readily available. Additionally, the use of a prima facie standard undermines the purpose of the market modification process -- to refine the television market because the original market determination was not clearly reflective of the station's true market. Unique circumstances are what prompts a party to seek market modification, and in establishing the market modification process, Congress did not intend that a rigid, formulaic method be used.

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The Post Company ("Post"), licensee of Station KIFI-TV, Idaho Falls, Idaho, herein submits its comments in response to the Report and Order and Further Notice of Proposed Rulemaking in CS Docket No. 95-178 (hereinafter "DMA Report and Order"), 11 FCC Rcd 6201 (1996).

I. Introduction

In its DMA Report and Order, the Commission posed several questions for comments. The Commission expressed concern about potential complications resulting from the transition to Nielsen Media Research's market definition, the designated market area ("DMA"), for must-carry purposes.

In particular, the Commission seeks comments on whether special provisions should be made for certain types of stations or cable systems to minimize disruption anticipated because of the switch to the DMA market definition. Additionally, the Commission requests input with

respect to the expected effect on previous market modification decisions made pursuant to Section 614(h) of the Communications Act, and on market modification decisions made following the 1996 election period for which Arbitron's ADIs were still used. Finally, the Commission asks for comments on ways to refine the market modification process without compromising administrative ease and efficiency.

II. Special Provisions Are Necessary to Minimize Disruption

A. Grandfathering of Stations Which No Longer Are Within A Particular DMA But Which Have Improved Their Signal Strength to Assure Carriage

1. The Dilemma

The Commission expressed concern about the implications of the switch to DMAs for certain types of stations and systems, "e.g., smaller market stations or systems with fewer than a specified number of subscribers." DMA Report and Order, 11 FCC Rcd at 6224. Post submits that there is good reason for concern.

First, the use of updated DMAs may place a significant economic burden on smaller stations. A station may only elect must-carry status on those systems that are within the "local broadcast television station's market," as defined by Section 76.55(e) of the Commission's rules. In many instances, stations have incurred great expense to ensure that cable system headends throughout their market receive a good quality signal. The use of pre-amplifiers, high-gain antennas and other specialized reception equipment is common. Indeed, the use of costly microwave systems is not unusual. If a particular cable system is included within a station's television market for one election period but not another, the station's investment in special signal-delivery equipment essentially will be lost. For small stations with smaller operating

budgets, the investment in special signal-delivery equipment can be significant. Clearly, the waste of such resources -- which potentially could be repeated every three years -- is not in the public interest. Moreover, the public would not be served by the withdrawal of long-carried stations from the cable system lineups.

2. The Solution

Post suggests that the Commission modify Section 76.55(e) of the Commission's rules to minimize the harm to stations. Specifically, Post recommends that a clause be added which would permit a station to retain must-carry on those systems for which the station previously was required to install equipment to ensure reception at the headend. By grandfathering stations in this fashion, stations will not face the risk that the cost of achieving must-carry status will outweigh the benefits, i.e., that significant amounts of money will be spent to ensure signal quality without the accompanying benefit of long-term carriage. In this manner, the stations can focus more on providing programming that is in the public interest rather than spending their resources to ensure cable carriage.

Post's proposed amendment to Section 76.55(e) is in harmony with previous Commission decisions regarding market definition. First, the fact that a particular station will be located in more than one television market is of no consequence. In a discussion regarding the permissibility of market modification, the Commission specifically noted that it is possible that a particular station may be "part of more than one television market." Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 2976 (1993) (hereinafter "Cable Act Report and Order"); see also 47 C.F.R. §76.55(e)(2). Second, the proposed arrangement is in accord with the Commission's policy of refining a particular

market definition when necessary to better mirror the actual market. In the Cable Act Report and Order, the Commission concluded that the market modification provision was "intended to permit modification of a station's market to reflect its individual situation." 8 FCC Rcd at 2977. Like the market modification process, the grandfathering of particular stations from shifting market definitions will more accurately reflect those stations' individual situations.

B. DMA Modifications Potentially Threaten Smaller Stations

A second concern with respect to the use of DMAs is that Nielsen does not always base its market determinations solely on audience viewing patterns. Nielsen's policies with respect to formulation of its market assignments indicate that viewing patterns is often only one of several factors given consideration.

First, Nielsen has specifically reserved the right to not create a DMA if there is insufficient funding to support Nielsen's services in a particular DMA.¹ Additionally, there are other considerations which may affect the outcome of a particular DMA, including "an opportunity for stations to petition [Nielsen] to change their market assignments" and reliance on factors other than viewing patterns in creating separate DMAs. DMA Report and Order, 11 FCC Rcd at 6224-25, n. 132.

As will be demonstrated below, consideration of criteria other than viewing patterns in formulating television markets is not consistent with the Commission's intended objectives in using DMAs. Furthermore, the lack of information available with respect to Nielsen's

¹ DMA Report and Order, 11 FCC Rcd at 6208, n. 23. Post does not discount the fact that Arbitron, too, "reserve[d] the right to exercise its professional judgment in county assignment policies..." *id*; however, there is no need to dwell on matters that are no longer at issue. Therefore, the focus of Post comments is limited to Nielsen's considerations in determining market assignments.

petitioning process, which permits changes in market configurations, may offend principles of administrative law and foster competitive imbalances.

1. Nielsen's Methodology For Determining Television Markets Is Not Widely Available

In its DMA Report and Order, the Commission acknowledged that Nielsen often relies on factors other than audience viewing patterns and will allow petitions for modification of a DMA.² However, in trying to obtain a copy of the resource cited by the Commission³ to better understand the ramifications of Nielsen's aforementioned policies, Post's counsel discovered it is not readily available.⁴ Under the circumstances, the Commission should heed the D.C. Circuit's admonishment in Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974), in which the court held that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency." Id. at 393. Here, the Commission should give consideration to the following with respect to the impact of Nielsen's policies regarding its DMAs.

² This fact was not made apparent in the original Notice of Proposed Rulemaking in CS Docket No. 95-178, 11 FCC Rcd 1904 (1995).

³ Nielsen Media Research, Nielsen Station Index: Methodology Techniques and Data Interpretation (1994-95).

⁴ Post's counsel requested the information from the following sources, all of which either declined to release the information, did not have the materials or did not respond:

- (a) FCC library;
- (b) Cable Services Bureau;
- (c) National Association of Broadcasters' library;
- (d) Nielsen Media Research; and
- (e) CSS Docket No. 95-178 records in FCC Public Reference Room.

2. Nielsen's Policies Undermine The Commission's Objectives

In its DMA Report and Order, the Commission concluded that the use of updated Nielsen DMAs will "allow future market designations to reflect changes in viewing patterns." DMA Report and Order, 11 FCC Rcd at 6202. Ironically, in the very same decision, the Commission recognized that Nielsen's formulation of DMAs often reflects considerations other than audience viewing patterns.

If Nielsen's DMAs were formulated solely on the basis of viewing patterns, then presumably there would be assurance that any variations from cycle to cycle would reflect only changes in those patterns. If, however, other factors are considered, the Commission's conclusion that updated DMA market definitions "provide the best method of ensuring local stations access to the consumers they are licensed to serve and to provide cable subscribers with the stations best suited to their needs and interests"⁵ is incorrect. Therefore, without identifying the exact formula used to determine television markets and without applying it consistently to all markets, Nielsen's current methodology does not achieve the Commission's goals.

3. Nielsen's Current Methodology Creates a Competitive Imbalance

Under the current scheme, a station, dissatisfied with its DMA assignment, is allowed to petition Nielsen to change it. If a station is persuasive, the resulting change in market definition does not necessarily reflect audience viewing patterns; rather, it is the result of a station flexing its muscles in order to benefit from a more favorable DMA assignment. Smaller stations stand to lose in this game, because they do not carry the clout nor the financial resources necessary to manipulate their DMA assignments. Moreover, this problem is exacerbated if with

⁵ DMA Report and Order, 11 FCC Rcd at 6221.

every updated DMA list, stations have another opportunity to petition Nielsen for modifications. In sum, to allow market modifications to be determined by Nielsen unduly penalizes other smaller stations which cannot afford to petition Nielsen to modify DMA assignments.

4. Nielsen's Petition Process Conflicts With The Commission's Market Modification Process

More importantly, there already is a means for redress if a party believes a market needs to be redefined. Market modifications pursuant to Section 614(h)(1)(C) of the Communications Act eliminates any need for stations to directly petition Nielsen. Under the market modification process, either a station or cable system may petition the Commission to add or delete communities within a particular television market.

The following are potential problems associated with Nielsen's policy to allow petitions to change a market's definition.⁶ First, the Commission's acquiescence to Nielsen's petition process may be an impermissible delegation of authority to a private party. Additionally, unlike proceedings before the Commission, a petition before Nielsen may not be adversarial in nature; therefore, others' views may not be taken into consideration. More importantly, the Nielsen petition process may have the following adverse consequences: (1) parties will petition Nielsen directly and avoid the Commission's market modification process in fear of their petitions being denied; (2) after receiving an adverse decision from the Commission, the party can petition Nielsen (or vice versa) and (3) Nielsen's decision may have a negative effect on other stations

⁶ Because of the lack of information available on Nielsen's methodology and the petition process, these limited comments are submitted for the Commission's consideration. Post, however, is unable to offer a more complete analysis without knowing more about Nielsen's methodology.

or cable systems, notwithstanding that they do not receive notice of the proposed change nor an opportunity to rebut the petitioner's claims.

Therefore, in order to avoid circumvention of the market modification rules and their intended purposes, the Commission needs to implement a mechanism by which DMA modifications that are the product of petitions to Nielsen will be ignored for must-carry purposes.

III. The Switch to the Nielsen Market Definition Must Not Effect Previous Section 614(h) Decisions

Pursuant to Section 614(h) of the Act, a station or cable system, dissatisfied with a market definition, may request that the Commission either add or delete communities to a television market. The Commission seeks commenters' thoughts on the ramifications of the changes in market definitions on decisions made previously and in the future through the Section 614(h) modification process.

A. Transition to DMAs Should Not Affect Previous Decisions Made Using The ADI Definition

Post strongly opposes any Commission measure to vacate decisions made pursuant to Section 614(h) prior to the Commission's decision to switch to Nielsen DMAs to define television markets. The market modification process was implemented to permit refinement of television markets so as "to better effectuate the purposes" of the must-carry provisions of the

Act,⁷ e.g., that stations be carried in the areas that they serve and which reflect their economic market.⁸

The market modification process takes into consideration factors such as (1) historic carriage, (2) local programming, (3) other stations eligible for carriage that provide local coverage and (4) viewing patterns.⁹ Use of these factors suggests that a Commission decision to delete or add communities with respect to a particular market is more accurately reflective of a station's true market. In addition, a decision to modify a market pursuant to Section 614(h) does not depend on what methodology is used to determine television markets in general. Therefore, regardless of whether ADIs or DMAs are used to generally define a television market, previous market modifications made pursuant to Section 614(h) should not be affected. Moreover, under the foregoing theory, market modifications made pursuant to the 1996 must-carry elections in which ADIs were used, should not be stayed, vacated or otherwise disturbed as a result of the transition to DMAs.

B. Transition to DMAs Should Not Affect Market Modification Process Under Section 614(h)

As discussed above, the market definition methodology used to designate a television market in general (ADI or DMA) is not an integral part of the market modification process under Section 614(h). Therefore, the transition to DMAs should have no effect on the market modification process itself.

⁷ See 47 U.S.C.A. § 534 (h) (1) (C).

⁸ See H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992) (hereinafter "House Report").

⁹ See 47 U.S.C.A. § 534(h)(1)(C)(ii)(I)-(IV).

Initially, as Post suggested in its previous Reply Comments in this docket, due to the fact that Nielsen DMAs do not perfectly coincide with Arbitron ADIs, the Commission will be confronted with a significantly greater number of market modification petitions.¹⁰ This, in of itself, does not suggest that the process is inherently flawed; in fact, the process becomes more important to achieving Congress' goal in enacting Section 614(h) -- to more carefully tailor the market definition so that it better reflects a station's particular circumstances. If there is an increased number of petitions pursuant to which the Commission makes modifications, it is a reflection of the inadequacies of Nielsen's methodology, not of the market modification process itself.

IV. Changes To The Market Modification Process Are Necessary To Maintain Administrative Efficiency

A. The Additional Information Sought By The Commission Will Improve The Market Modification Process

Post agrees with the Commission's proposed changes to the criteria considered in determining whether to modify a station's market. Under the current scheme the focus is on historical cable carriage, local coverage provided by the station, local coverage of other stations eligible for carriage, and viewing patterns. The legislative history for this provision reveals that the market modification process under Section 614(h) was intended to compensate for the inadequacies of using ADIs in determining television markets. See House Report at 97. However, the criteria listed in the statute were not intended to be exclusive. Id. Therefore, the Commission's proposed additions of relevant community locations and geographic features and

¹⁰ See Post Reply Comments filed February 26, 1996, at 2.

information showing a nexus between the stations and the cable community is not inconsistent with Congress' intention in promulgating the original criteria. More importantly, the additional information requested will enhance the Commission's ability to refine a television market, and hence, serve Congress' objective that "television stations be carried in the areas which they serve and which form their economic market." Id.

As Post already suggested, the switch to DMAs will result in a substantial number of market modification requests being filed. Therefore, the addition of the proposed criteria will facilitate the process by giving stations and cable systems notice of the types of information that is considered important by the Commission. In turn, stations and cable systems will know to obtain such information in advance, and this will make the process more efficient.

B. Establishment Of A Prima Facie Standard Will Not Expedite The Market Modification Process

The Commission's proposal to shift the extent of the burden of production will not further expedite market modifications under Section 614(h). It is because the market determinations made by Nielsen or the like are not formulated with exact precision that the necessity for market modification proceedings arises. Therefore, to impose yet another rigid, formulaic method for refining market determinations would not further Congress' purpose in adopting Section 614(h).

Significantly, the premise upon which the Commission rests this proposal -- placing the burden of production on the party with greater access to information -- is faulty. There are no lines of demarcation delineating which party would have easier access to particular facts, i.e., it depends on which party is seeking modification. For example, the Commission proposes to

have the party seeking modification provide information with respect to historical carriage of the station at issue or others from the same area. But, a station seeking modification may not have easier access to such information; the cable system may. Therefore, it would be illogical to impose a rule of general applicability requiring the party seeking modification to come forth with specific information.

In addition, imposition of a prima facie standard ignores the fact that Congress intended that any and all factors are to be considered to identify the truest definition of the market. See House Report at 97. This suggests that depending on the specific case before it, the Commission is to afford different weight to the attendant factors in determining whether modification is appropriate. Use of a prima facie standard would disregard the importance of the need to assign different weight to different factors in different circumstances.

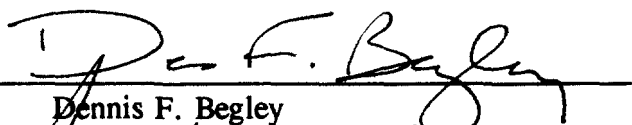
It would make more sense to distribute the burden according to the type of information and to require the station or cable system to provide it accordingly. To illustrate, a station is better equipped to provide information as to its local programming; therefore, the station should carry the burden of providing such information. On the other hand, a cable system could more easily ascertain the historical coverage of stations from the same area as the station at issue; therefore, it should bear the burden of production.

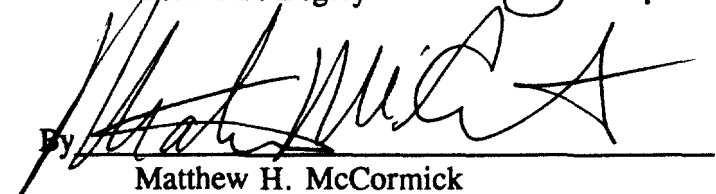
Stated simply, in light of Congress' objective of refining the television market so as to reflect the areas served and its economic market, Commission decisions are to be based on considerations of unique circumstances. However, the Commission's proposal with respect to the use of a prima facie standard for refining a television market fails to account for such circumstances.

V. Conclusion

The Commission should make every effort to limit the disruption caused by the use of the Nielsen standard. This should include modification of Section 76.55(e) to allow grandfathering of those stations that installed specialized receiving equipment to achieve must-carry status. Additionally, the Commission should consider the consequences of the reality that Nielsen's methodology for determining DMAs is not available to the general public and that Nielsen entertains petitions from interested parties to modify DMAs. Moreover, the transition to DMAs should have no impact on prior Commission decisions to modify a particular market, nor on those decisions to be made between now and 1999. Finally, the use of additional criteria will enhance the market modification process, but the use of a prima facie standard will undermine Section 614(h)'s purpose.

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October 31, 1996

CERTIFICATE OF SERVICE

I, Pamela R. McKethan, hereby certify that on this 31st day of October, 1996, a copy of the foregoing **COMMENTS OF THE POST COMPANY** was hand-delivered to:

Ms. Dorothy Conway
Federal Communications Commission
1919 M Street, N.W., Room 234
Washington, D.C. 20554

A handwritten signature in cursive script, reading "Pamela R. McKethan", written in black ink.

Pamela R. McKethan